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SPONTANEOUS DECLARATIONS (*RES GESTAE*)

THOMAS P. HARDMAN*

IN the initial installment of this article⁸³ the writer discussed the the Spontaneous Declarations doctrine chiefly from the standpoint of whether "spontaneity," the rationale of this exception to the hearsay rule, may spring only from situations in which there was a startling event (the Wigmorean theory), or whether it may also spring from any occasion, startling or other, when the challenged hearsay statement was made "while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter" (the Thayer theory). In that installment it was found that there are West Virginia decisions supporting each of these views: first one theory is proclaimed, then another, often with unpredictable results.⁸⁴

In this concluding installment it will be assumed, unless otherwise indicated, that the event or condition involved in the discussion was a startling occurrence within the meaning of the Wigmorean doctrine inasmuch as the points herein considered pertain particularly if not solely to situations falling within the

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⁸³ Hardman, SPONTANEOUS DECLARATIONS (*Res Gestae*), 54 W. VA. L. REV. 93 (1952).

⁸⁴ Cf. Kenna, J., in *Reynolds v. T. W. Grant Co.*, 117 W. Va. 615, 619, 186 S.E. 603, 604, 605 (1936): "The holdings under, and discussions of, the doctrine of *res gestae* appear to contain a preponderance of confusion, so that it is almost impossible to reach a conclusion with reference to it that cannot at least partially be undermined by decided cases and text comments. A part of this confusion seems to come from seeking to apply the rule where there is no necessity to invoke it because of the fact that the proof offered is not hearsay at all, and a part of it seems to come from the fact that the rule is frequently sought to be invoked where, in reality, the evidence sought to be introduced is admissible under some other exception to the hearsay rule."

Wigmorean restriction; it will be similarly assumed that the challenged hearsay statement was made while the declarant was under the stress of a nervous excitement caused by his perception of the startling event or condition, so that the declaration may be regarded as "spontaneous" and therefore admissible unless some court-sanctioned limitation should require a different conclusion. Four of these limitations or supposed limitations were dealt with in the first part of this article; and it is the purpose of this installment to comment briefly upon the more important of the remaining qualifications or alleged qualifications of this exception to the hearsay rule.

5. *Must the challenged hearsay assertion relate to the circumstances of the occurrence preceding it? Must it "elucidate" the startling occasion and not refer to some prior matter?*

The leading textbook on evidence lays it down rather categorically that this question must be answered in the affirmative.⁸⁵ Moreover, the latest noteworthy case in this jurisdiction, herein-after examined at some length, declares unequivocally that a hearsay statement, to be admissible under this exception, must "relate to contemporaneous occurrences" and must not "refer to a past event."⁸⁶ But does this exception necessarily exclude a "spontaneous" declaration which refers to a prior but relevant matter? And is it the law in West Virginia that such an utterance is, for that reason, inadmissible?

First of all, why should a declaration, if it is spontaneous (*i.e.*, unreflective and therefore reasonably trustworthy), be excluded merely because the declaration happens to "elucidate" some relevant matter anterior to the startling occurrence? *Quaere* whether this limitation, to the extent that it is actually enforced by the courts, is not a spurious one borrowed from the so-called "verbal act" doctrine which does not involve the hearsay rule at all, inasmuch as the "elucidating" declarations are not offered to prove the truth of the facts asserted but are offered as being themselves an operative part of the acts in question?⁸⁷

⁸⁵ See WIGMORE, EVIDENCE §§ 1750, 1754 (3d ed. 1940).

⁸⁶ *Coates v. Montgomery Ward & Co.*, 133 W. Va. 455, 458, 57 S.E.2d 265, 268 (1945).

⁸⁷ Cf. MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE § 432 (1937).

Fortunately we have two comparatively recent West Virginia decisions presenting this problem: *Gilmore v. Montgomery Ward & Co.*,⁸⁸ and *Coates v. Montgomery Ward & Co.*⁸⁹ But, unfortunately, these cases, though involving very similar facts and decided during the same term of court, seem to reach diametrically opposite conclusions with respect to this problem. In each of these cases the issue was the same, namely, whether the defendant had negligently maintained a slippery floor by reason of which the plaintiff, a customer, had fallen and injured herself. In the *Gilmore* case the challenged hearsay declaration was a statement by an employee who had personally observed the event and who had said immediately after the customer's fall at about 11:30 in the morning that the floor had been waxed the night before. Obviously the startling occurrence was the plaintiff's fall; and it would seem equally obvious that the assertion clearly referred to a prior event, namely, placing wax on the floor the night before the event. Nevertheless our court held the evidence admissible as a spontaneous declaration. Said the court:

"However, a different situation exists as to the testimony of plaintiff in which she reiterated an extrajudicial statement made by an unidentified clerk who first rendered plaintiff assistance after her accident. It is clearly shown that the clerk reached plaintiff immediately after her fall. The spontaneity of the clerk's statement cannot be denied; and it is reasonable to infer from all the evidence that such clerk was a witness to the accident and was laboring under the stress of emotion or excitement at the time of uttering the statement. This being true, the clerk's statement constituted a part of the *res gestae*, and was admissible. . . ."⁹⁰

In the *Coates* case the challenged hearsay statement was an assertion by an employee who said, immediately after the plaintiff's fall and while she was aiding the plaintiff, that she, the employee, had very nearly fallen that same morning at exactly the same spot. In holding the evidence inadmissible the court said (*inter alia*):

"... Furthermore, the statement did not relate to the actual injury of the plaintiff below. *Res gestae* means a part

⁸⁸ 133 W. Va. 342, 56 S.E.2d 105 (1949).

⁸⁹ 133 W. Va. 455, 57 S.E.2d 265 (1949).

⁹⁰ 133 W. Va. at 347, 56 S.E.2d at 108.

SPONTANEOUS DECLARATIONS

of the thing done. The thing done is not any declarations made at that time but declarations that relate to contemporaneous occurrences. *Reynolds v. Grant*, 117 W. Va. 615, 186 S.E. 603. . . . Here the declaration referred to a past event: Mrs. Lee having almost fallen before Mrs. Coates' injury. . . ."⁹¹

"In order to be admissible as part of the *res gestae* a declaration must relate to the occurrences which gave rise to the application of the rule and not to happenings prior thereto."⁹²

If the above-quoted reasoning in the *Coates* case is sound, it would seem that the *Gilmore* case was erroneously decided; for, as hereinbefore indicated, the hearsay assertion admitted in that case referred to a happening prior to the startling event, namely, the waxing of the floor the night before the fall, and it was an event more remotely past than the one in the *Coates* case. Query, then: Does the *Coates* case overrule the *Gilmore* case on the point here considered?

To begin with, it must be conceded that courts often use language similar to that in the *Coates* case.⁹³ And, it must be admitted, a statement made soon after a startling occurrence but referring to a happening prior thereto is generally either (1) irrelevant,⁹⁴ or (2) not spontaneous.⁹⁵ It is usually not spontaneous for the reason that as a rule such an utterance involves reflection or premeditation and therefore is not sufficiently trustworthy to come within this exception.⁹⁶ Hence cases purporting to impose this limitation generally reach a sound conclusion, and would generally reach the same conclusion by a proper application of the exception if there were no such limitation or supposed limitation. But where as in the *Gilmore* case the court is satisfied that such a statement is spontaneous, the hearsay assertion would seem to fall within this exception, for the reason for the exception exists, and all relevant evidence should be admitted unless some rule or principle of law, rationally interpreted and applied, requires it to be excluded.⁹⁷ Indeed Wigmore concedes that on principle there is

⁹¹ 133 W. Va. at 458, 57 S.E.2d at 268.

⁹² *Id.*, Point 3 of the syllabus.

⁹³ See, e.g., a dictum in *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 174, 8 S.E.2d 825, 826 (1940).

⁹⁴ See *McCORMICK AND RAY*, *op. cit. supra* note 87, § 432.

⁹⁵ Cf. *WIGMORE, EVIDENCE* §§ 1750 par. c, 1754.

⁹⁶ *Ibid.*

⁹⁷ Cf. *THAYER, A PRELIMINARY TREATISE ON EVIDENCE* 530 (1898).

perhaps no less reason for letting in a declaration relating to some distinct prior circumstance than for letting in declarations relating to the startling event.⁹⁸ But he adds that "Apparently the Courts are disposed, on one theory or another, to enforce this restriction."⁹⁹ As to this latter statement by Wigmore, it can only be said that sometimes, as in the *Gilmore* case and in several other cases,¹⁰⁰ a few of which are herein considered, the courts do decide the question on principle, and do not enforce this restriction or supposed restriction.

A noteworthy example of such decisions is *Jack v. Mutual Reserve Fund Life Ass'n*,¹⁰¹ which Wigmore disposes of rather feebly in a footnote by characterizing the holding as "an example of extremely liberal interpretations of this limitation."¹⁰² In that case it appeared that a Dr. Lipscomb had handed the declarant a box containing a capsule and had told him to take it before going to bed. There was evidence that Lipscomb and Jack were parties to a conspiracy to defraud the defendant; and that the declarant, after receiving the capsule, swallowed it and became violently sick, and that while so suffering he made this statement: "Dr. Lipscomb killed me with a capsule he gave me tonight, and Guy Jack had my life insured and hired Dr. Lipscomb to kill me."

Clearly the latter part of this statement referred to a past event, and there was an objection to this part of the statement on the ground "that it narrated a past transaction."¹⁰³ The court, however, held the declaration admissible. To characterize this holding as an "extremely liberal interpretation of this limitation" would seem to be an example of twisting the facts of a case to make them fit a theory. Such a limitation, if realistically enforced in this case, would certainly have excluded the declaration.

This decision was rather recently followed in the case of *Sanitary Grocery Co. v. Snead*.¹⁰⁴ In that case an issue was whether the defendant had negligently permitted vegetable debris to accumulate on the floor of the defendant's store whereby the plaintiff,

⁹⁸ WIGMORE, EVIDENCE § 1750.

⁹⁹ *Id.* § 1754.

¹⁰⁰ See, citing a number of cases pro and con, 163 A.L.R. 15, at 193-198 (1946).

¹⁰¹ 113 Fed. 49 (5th Cir. 1902).

¹⁰² See WIGMORE, EVIDENCE § 1754 n.3.

¹⁰³ 113 Fed. 49, 53. The court interpreted the objection as indicated in the text.

¹⁰⁴ 90 F.2d 374 (D.C. Cir. 1937).

SPONTANEOUS DECLARATIONS

a customer, slipped, fell and was injured. The challenged declaration was a statement by a clerk in the store, made immediately after the fall, that the vegetables had been there on the floor for a couple of hours. It seems clear enough, that in a strict sense at least, the declaration referred to a past event, namely, the placing of vegetable debris on the floor two hours prior to the fall, just as the declaration in the *Coates* case referred to a prior slipperiness of the floor, the prior slipping on the floor by another person. In holding the declaration admissible the court said, apropos of this point:

"The objection of the defendant is that what the clerk said was narrative in character, in that he said that the vegetables had been on the floor for several hours. This objection confuses the content of the utterance with its character, as being spontaneous in respect of the event or fact to which it relates. . . . It seems apparent that the comments of the clerk as to the time during which they [the vegetables] had been there were as spontaneous as any other portion of his remarks."¹⁰⁵

Moreover the leading West Virginia case of *Reynolds v. W. T. Grant Co.*,¹⁰⁶ which is relied upon by both the *Gilmore* case and the *Coates* case, tends to support this conclusion. In the *Reynolds* case, which also involved an issue as to whether the defendant had negligently maintained a slippery floor by reason of which the plaintiff, a customer, had fallen and sustained an injury, the hearsay declaration, made by an employee of the defendant soon after the fall, was to the effect that someone else had fallen at the same place earlier in the day. The court ultimately excluded the statement on the sound ground that it did not sufficiently appear that the declarant had had the requisite opportunity for personal observation. However, except for that lack of personal observation, it seems fairly clear from the court's reasoning that the declaration would have been regarded as admissible. Moreover the court in the *Coates* case cites only one West Virginia case to support the asserted limitation, and that is the *Reynolds* case.

It is true that in that part of the opinion in the *Reynolds* case which deals with the alleged admissibility of the declaration as

¹⁰⁵ *Id.* at 376-377.

¹⁰⁶ 117 W. Va. 615, 186 S.E. 603 (1936).

an admission by an agent, the court pointed out that the declaration "related to a past happening", and it therefore did not relate to an act performed by him within his authority as an agent. But immediately thereafter, in dealing with the admissibility of the statement as a Spontaneous Declaration, the court said:

"Concerning the question whether this evidence is admissible as constituting a part of the *res gestae*, we are of the opinion that it does not fall within that exception. We start, of course, with the proposition that the evidence is hearsay and for that reason is to be excluded. It follows, that if the plaintiff wishes to bring the evidence within any of the recognized exceptions of the hearsay rule, the burden is upon him who adduces the evidence to show that all of the elements constituting the exception are present. We are of the opinion that one vital element, at least, is lacking in the evidence sought to be introduced in the case at bar. The store manager stated that another person had fallen the same morning, but the source of his information to that effect does not appear. For all that appears, third persons may have informed the store manager to that effect. If that were so, then his declaration at or shortly after the time that the plaintiff fell would be merely a hearsay statement of hearsay information. We think that the burden is upon the person adducing the evidence to bring it clearly out of this doubtful category. *Had the manager declared that he had seen some other person fall at the the same point that morning, thus making his declaration relate to facts within his own knowledge, the exception might properly apply.*"¹⁰⁷

The italicized statement (italics supplied) seems to negative the existence of a limitation excluding declarations merely because they relate to a happening prior to the startling event. It must be conceded, however, that in an earlier part of the opinion the court had used some broad language which might be interpreted as supporting such a limitation. Said the court: "If the declarant is laboring under stress of emotion or excitement so that his declaration relating to the occurrence from which that excitement or emotion sprang was spontaneous in a way that precludes the reflection upon which falsehood is based, then the declaration falls truly within the *res gestae* exception to the hearsay rule and the question of agency is beside the point."¹⁰⁸ This general

¹⁰⁷ 117 W. Va. at 622-23, 186 S.E. at 606.

¹⁰⁸ *Id.* at 620, 186 S.E. at 605.

language, however, can hardly be regarded as overbalancing the court's subsequent specific statement above quoted.

Nor is the *Coates* case, the latest West Virginia case of importance in point, believed to overrule the *Gilmore* case; for in the *Coates* case the court first excluded the evidence on the admittedly sound ground that it did not appear that the declarant had the requisite personal knowledge. Consequently it would seem that the second ground assigned by the court for excluding the evidence cannot be regarded as an authoritative precedent for the doubtful proposition therein propounded, because not only was the second ground assigned unnecessary in order to dispose of the point under discussion but this gratuitously assigned reason is *contra* to the holding in the *Gilmore* case which the *Coates* case cites with approval, although on another point. It is believed therefore that the second reason assigned in the *Coates* case is only a dictum. To be sure, the inconsistent statement in the *Coates* case did happen to find its way into the syllabus; but, as the writer has attempted to prove elsewhere in this *Review*, the mere fact that a statement, otherwise a dictum, happens to have found its way into the syllabus does not make it authoritative: it is still a dictum.¹⁰⁹ As our court has said and held, with respect to another unnecessary statement by the court which had unfortunately found its way into the syllabus: the too-broad statement in the syllabus "is not the law and never has been in this state": it is not the law for the reason, as the court well put it in that case, that "the language in the syllabus is broader than the opinion warrants".¹¹⁰

The most obvious explanation of the inconsistency in these two cases is that in the *Gilmore* case the court used the modern rationale of this exception, namely, spontaneity, whereas in the *Coates* case the court used the old *res gestae* terminology with its supposed requisite of contemporaneity. Yet our court had previously laid it down in the much-cited *Collins* case that "spontaneity rather than contemporaneity is now the generally recognized test of admissibility. 'The spontaneity of the utterance is the guaranty of its trustworthiness.'"¹¹¹ Consistency in decisions can

¹⁰⁹ See Hardman, "THE LAW"—IN WEST VIRGINIA, 47 W. VA. L.Q. 23 (1940).

¹¹⁰ See *State v. Graham*, 94 W. Va. 67, 71, 72, 117 S.E. 699 (1923), thus commenting on the syllabus in *State v. Burnett*, 47 W. Va. 731, 35 S.E. 983 (1900).

¹¹¹ *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 173, 8 S.E.2d 825 (1940).

hardly be obtained when first one rationale and then another is invoked in applying the same legal rule. The life of a rule of law lies in its reason: where the reason for a legal rule applies, the rule applies (or should), at least if the legal rule is a sound one, and the soundness of the Spontaneous Declaration doctrine is almost universally conceded.

6. *Are self-serving declarations admissible under this exception?*

Although there seems to be a widespread belief in this jurisdiction (and in some other jurisdictions) that there is a Special Rule of Evidence excluding self-serving extrajudicial assertions, it is submitted that the authoritative precedents in point in West Virginia do not, if properly interpreted, support this belief: the judicial expressions supporting it are merely dicta. Such self-serving declarations, if offered to prove the truth of the facts asserted, are condemned by the hearsay rule but are admissible if they come within one of the recognized exceptions, *e.g.*, the Spontaneous Declarations doctrine. The writer has, however, discussed this problem rather fully in a prior issue of the *Review*, and so the question will not be further considered here.¹¹²

7. *To what extent, if any, does this exception admit extrajudicial complaints of rape or other violent sex offenses?*

In the United States, the orthodox view is that this exception does not admit the details of a complaint of rape although the mere fact of complaint, when the person attacked has testified, is admissible.¹¹³ But that limited use of the complaint does not violate the hearsay rule at all since the evidence, so used, is offered circumstantially, in corroboration of testimony, and not for the purpose of establishing the truth of the matter asserted.¹¹⁴ Of course such extrajudicial complaints may be offered in other ways not needing a hearsay exception to justify admissibility.¹¹⁵ Some

¹¹² See Hardman, *Hearsay: "Self-Serving Declarations,"* 52 W. VA. L. REV. 81 (1950).

¹¹³ See *State v. Peck*, 90 W. Va. 272, 275-276 (1922); WIGMORE, EVIDENCE §§ 1134-1140. The modern English cases generally admit the detailed statements, though with some limitations. See WIGMORE, EVIDENCE §§ 1760, 1761.

¹¹⁴ See WIGMORE, EVIDENCE §§ 1134-1140, 1760, 1761.

authorities claim that such complaints may never be properly considered under this exception.¹¹⁶

But when the detailed statement of a complaint of rape or any other violent sex offense is so offered as to violate the hearsay rule, why does not the ordinary Spontaneous Declarations doctrine admit the statement as to details, *e.g.*, as to the identification of the assailant, if the statement is made while the declarant was under the stress of a nervous excitement caused by the assault?

The orthodox view is thus expressed by the West Virginia court in *State v. Peck*¹¹⁷ decided in 1922:

"It is well settled by the great majority of decisions and by the text writers that it is error to permit a witness to whom the prosecutrix has detailed the particulars of a crime of this character to repeat to the jury what she said in relation thereto, especially where the witness details the particulars of the occurrence. In a few of the jurisdictions the details of the complaint are held admissible for the purpose of corroborating the prosecutrix, but, as above stated, the great weight of authority is that any person to whom she has made a complaint or detailed the circumstances is not permitted, when placed on the witness stand, to repeat all of the details and particulars as reported to the witness by her. . . . The rule and the reason therefor are given by Judge Allen in the leading case of *Brogy v. Commonwealth*, 10 Gratt. (Va.) 722, decided in 1853. It is there stated, 'though it is competent to prove a fact of a recent complaint by the female for the purpose of sustaining her credit, it is not competent to prove the particulars of her complaint.'"¹¹⁸

It was not claimed in the *Peck* case, however, that the statement in question was admissible as a Spontaneous Declaration. But that claim was made in *State v. Coram*,¹¹⁹ the leading West Virginia case in point. In the *Coram* case the challenged assertions were made soon after the attack, and it was held by the trial court that the

¹¹⁵ *E.g.*, corroboration by similar statements after impeachment. See WIGMORE, EVIDENCE §§ 1137, 1138.

¹¹⁶ See THAYER, CASES ON EVIDENCE 641, 643-645 (2d ed. 1900); McKELVEY, EVIDENCE § 234 (4th ed. 1932). Even Wigmore discusses this problem under the heading "Special Forms of the Exception", although he argues in favor of the application of the ordinary Spontaneous Declarations exception. See WIGMORE, EVIDENCE §§ 1760, 1761.

¹¹⁷ 90 W. Va. 272, 110 S.E. 715 (1922).

¹¹⁸ *Id.* at 275, 276, 110 S.E. at 716.

¹¹⁹ 116 W. Va. 492, 182 S.E. 83 (1935).

complainant, a child five and one-half years old, was incompetent to testify, so that the proposed use of the extrajudicial statements as to details unquestionably violated the hearsay rule, as the court seems to have conceded. In affirming the admissibility of this evidence, the court said:

"The attorney general contends that the statements of the child are admissible as part of the *res gestae*. Statements are admissible as such if spontaneous and made while under the influence of the transaction itself. . . . [The child's] conversation with her mother occurred within a few minutes after she had been attacked. . . . Under such circumstances, it seems beyond question that her statement was spontaneous. . . . There is a division of authority on the reception of such a statement . . . where the injured female does not testify. The later authorities favor its admission when part of the *res gestae*. . . . 'Under this theory, therefore, although the victim of rape is not a witness, both her complaints, and the details thereof, are admissible, where the circumstances are such that they constitute a part of the *res gestae*.'"¹²⁰

A rather recent Virginia case, *McCann v. Commonwealth*,¹²¹ admits a detailed statement to prove the identity of the assailant. In discussing the admissibility of the extrajudicial assertion, the court relied largely upon *Hill v. Commonwealth*,¹²² a case involving a violent non-sex crime. Said the court:

"In *Hill's case*, . . . the court had under consideration a similar question to the one under review. After citing the case of *Rex v. Foster*, 25 Eng. C. L. R. 421, the court laid down this rule: 'All that is necessary, according to these cases, to make the declaration part of the *res gestae*, is that it should be made recently after receiving the injury, and before he had time to make up a story, or devise anything for his own advantage. Tested by this rule, the statement referred to is clearly admissible.'"¹²³

From the reasoning and holding of the Virginia court in the *McCann* case, and from the tenor of the opinion of the West Virginia court in the *Coram* case, it seems clear that both courts applied the ordinary Spontaneous Declarations exception. Several

¹²⁰ *Id.* at 494, 495, 182 S.E. at 84-85.

¹²¹ 174 Va. 429, 4 S.E. 2d 768 (1939).

¹²² See 2 Gratt. (43 Va.) 594 (1845).

¹²³ 174 Va. at 439, 440, 4 S.E.2d at 771.

decisions from other jurisdictions are *accord*, and some of these cases include violent sex crimes other than rape or attempted rape.¹²⁴ This view seems quite sound, provided of course that the challenged hearsay assertion was made while the declarant was under the stress of a nervous excitement caused by the attack, and provided that the other requirements of this exception are present, particularly the requirement next to be considered.

8. *Is the challenged declaration admissible to prove that that there was an exciting event? Or must that preliminary fact be established by competent evidence dehors the declaration?*

Under other exceptions to the hearsay rule, we first prove the preliminary fact upon which the admissibility of the challenged assertion depends.¹²⁵ For example, an admission by an alleged agent is receivable against his alleged principal only if the admission was made by one who was an agent and while he was acting within the scope of his authority. But the fact of agency may not be proved by the challenged extrajudicial assertion of the alleged agent to the effect that he is, or was, an agent: to permit that would be begging the question: it would be permitting the declaration in dispute to life itself into the case by its own bootstraps.¹²⁶

This hearsay danger presents itself to an unusual degree in cases of violent sex offenses.¹²⁷ But it often arises in other types of adjudication. An important case in point is *Armour v. Industrial Comm'n*.¹²⁸ In that case an issue was whether an employee had received an injury by a fall and whether this injury was sustained in the course of his employment; also it was necessary to prove this by technically competent evidence. A statement made by the employee shortly after the alleged fall was regarded by the court as admissible if competent evidence established that there had

¹²⁴ See, e.g., *State v. Gorman*, 229 Minn. 524, 40 N.W.2d 347 (1949) (indecent assault on a boy less than 4 years of age). See, collecting cases in point, WIGMORE, EVIDENCE § 1761, especially 1953 Supp.

¹²⁵ See WIGMORE, EVIDENCE § 1761.

¹²⁶ This is apparently never disputed. See WIGMORE, EVIDENCE § 1078; JONES, EVIDENCE IN CIVIL CASES § 255 (4th ed. 1938).

¹²⁷ In the West Virginia case of *State v. Coram*, *supra* note 119, heretofore discussed in the body of this article, the happening of a nervous shock (attempted rape) was perhaps sufficiently established by evidence dehors the declaration. The court, however, seems to have ignored the point.

¹²⁸ 78 Colo. 569, 243 Pac. 546 (1926).

been such fall. But the only proof of this fall was that the employee had said, "I got a dirty fall. . . . I went to turn the ice machine off of center and the lever slipped." There was no evidence that the employee was then suffering pain. The court held that the statement by the employee, the evidence in dispute, was admissible under this exception to prove that there was such a fall. There are several other cases *accord*, or seemingly *accord*.¹²⁹

The principal West Virginia case in point, which seems to be regarded by some as permitting the hearsay in dispute to be so used,¹³⁰ is *Collins v. Equitable Life Insurance Co.*¹³¹ In that case an issue was whether the insured had sustained an accidental injury. There were no eyewitnesses to the alleged accident. The challenged hearsay assertion offered to prove that there was an accident was that the insured upon entering his office one morning said that he had "slipped on the icy pavement and fallen."

In discussing the admissibility of this hearsay statement, and after declaring the evidence admissible, the court said:

"We are aware that a number of authorities have said there must be 'a main or principal fact', which the declaration illustrates. . . . Some authorities go further, saying 'The act itself must be first established before the illustrative declarations can be admitted.' . . . Mr. Wigmore says these limitations are 'spurious', having been borrowed from what he terms 'the verbal act doctrine,' and having no proper place in the doctrine of *res gestae*. He further says that expressions such as those above are 'frequent enough,' but that there seems to be no ruling in the United States turning directly upon such 'supposed limitations.' . . . Whether or not his criticism is well taken, there is unquestionably much confusion on the subject of *res gestae*. . . . This, however, seems settled: . . . when [as in this case] appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as a part of it, and be competent evidence under the *res gestae* doctrine."¹³²

¹²⁹ See, e.g., *Johnson v. W. S. Nott Co.*, 183 Minn. 309, 236 N.W. 466 (1931); *Young v. Stewart*, 191 N.C. 297, 131 S.E. 735 (1926); *Bunker v. Motor Wheel Corp.*, 231 Mich. 334, 204 N.W. 110 (1925); *National Life & Accident Ins. Co. v. Hedges*, 233 Ky. 840, 27 S.W.2d 422 (1930).

¹³⁰ Cf. MORGAN & MAGUIRE, *CASES ON EVIDENCE* 732n. (3d ed. 1951): "The declarant was apparently in great pain when he reached his office, but there was no evidence as to the cause of his pain except his own statement that he had fallen on the ice."

¹³¹ 122 W. Va. 171, 8 S.E.2d 825 (1940).

¹³² *Id.* at 173, 174, 8 S.E.2d 826.

SPONTANEOUS DECLARATIONS

From this language of the court, it is perhaps arguable that the court condemns, as a "spurious limitation", the quoted proposition that "the act itself must be first established before the illustrative declaration can be admitted." It is submitted, however, that the result reached in the *Collins* case is sound; for there was evidence, apart from the challenged hearsay statement, that there had been a startling occurrence: there was competent evidence that, when the declarant parked his car, he was in his usual health and that about ten minutes later, when he entered his office, it was evident from his physical appearance and otherwise that he was in great pain: "he would lay down and then get up He was moaning and groaning"; also "his arms were bruised."¹³³

All this would seem sufficient proof, apart from the challenged hearsay statement, that the declarant had just experienced *some* shock producing the kind of nervous excitement requisite under this exception. The measure of persuasion on preliminary decisions by the trial judge differs somewhat in different courts.¹³⁴ The West Virginia view has been judicially expressed as follows in the leading case of *State v. Meek*:¹³⁵

"It is the general rule that courts should determine all questions relating to the admission of evidence. . . The ruling of the trial court on such a question [of fact] will not be disturbed on review when there is legal evidence to support it unless it is clearly erroneous."¹³⁶

But is hearsay, which is inadmissible by the ordinary rules of evidence, sufficient per se to sustain a trial court's preliminary ruling on a question of fact? In the *Meek* case, it was contended that there was not sufficient evidence to justify the trial court's ruling that the declarant (in a Dying Declarations case) was "under the realization of impending death." The West Virginia Supreme Court of Appeals made its decision turn on the sufficiency of the

¹³³ *Id.* at 172, 8 S.E.2d at 825, 826.

¹³⁴ See, e.g., *Commonwealth v. Polian*, 288 Mass. 494, 498, 193 N.E. 68, 70 (1934); WIGMORE, EVIDENCE § 2550; MORGAN & MAGUIRE, CASES ON EVIDENCE 623, 624n. (3d ed. 1951): "Where the orthodox rule is recognized it is usually said that the finding of the trial judge will not be disturbed on review if there is evidence which would justify a reasonable trier in so finding, but the appellate court sometimes seems to substitute its judgment for that of the judge below."

¹³⁵ W. Va. 324, 148 S.E. 208 (1929).

¹³⁶ *Id.* at 329, 148 S.E. at 210.

deceased's hearsay declaration to the effect that he knew he did not have long to live. The court said that the hearsay evidence was "sufficient legally to justify the ruling" by the trial court.¹³⁷ In that case, however, the challenged hearsay declaration, which seems to have lifted itself into the case by its own bootstraps, really did not do so; for the dying declarant's statement that he was aware that he was about to die would be admissible under another exception to the hearsay rule, namely, Declarations Evidencing Physical or Mental Condition.¹³⁸ The court, however, did not mention this point.

The case of *Insurance Co. v. Mosley*,¹³⁹ decided by the Supreme Court of the United States, is perhaps the leading case on this general question. In that case there was an issue as to whether the assured had lost his life by accident. There were no eye-witnesses to the alleged accident, a fall. The court held that declarations by the assured that he had just fallen downstairs and almost killed himself were admissible. There was, however, other evidence showing that there had been a startling occurrence. At the time the assured spoke, it was proved that "his voice trembled; he complained of his head, and appeared to be faint and in great pain."¹⁴⁰ Consequently, the *Mosley* case, like the West Virginia decision in the *Collins* case, seems sound enough.

It should be pointed out, however, that in cases before administrative tribunals, where in general the technical rules of evidence do not obtain, such hearsay declarations may be admitted as *tending to prove* that there was a startling occurrence, e.g., a fall causing the injury, although it is generally held that such an administrative finding of fact may not be based solely on hearsay incompetent by the ordinary rules of evidence.¹⁴¹ But in all types of cases where the hearsay rule obtains, there would seem to be little or no justification for the decisions holding that the hearsay statement may be used to establish the preliminary question of fact upon which its admissibility depends. The only justification for

¹³⁷ *Id.* at 330, 148 S.E. at 210.

¹³⁸ See e.g., *State v. Abbott*, 8 W. Va. 741 (1875); *State v. Cook*, 81 W. Va. 686, 695 (1918); *Stevens v. Friedman*, 58 W. Va. 78, 51 S.E. 132 (1905); WIGMORE, EVIDENCE §§ 1714-1731.

¹³⁹ 8 Wall. 397 (U.S. 1869).

¹⁴⁰ *Id.* at 403.

¹⁴¹ See *Machala v. Ott*, 108 W. Va. 391, 151 S.E. 313 (1930); *Machala v. Compensation Commission*, 109 W. Va. 413, 155 S.E. 169 (1930); WIGMORE, EVIDENCE § 4c.

such holdings would seem to lie in the Wigmorean pronouncement, supported by some authority, that "In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply."¹⁴² The soundness of this proposition with respect to all its implications is, however, at least doubtful; and several if not most of the square decisions on the point seem to forbid the judge to receive hearsay inadmissible by jury trial rules when he is making his preliminary decisions.¹⁴³ Perhaps it would be justifiable, as in controversies before administrative tribunals, to consider the challenged hearsay declaration along with other evidence, but there should be other competent evidence: hearsay which is inadmissible by the ordinary rules should not be a sufficient basis for even a preliminary decision by a trial judge: the hearsay dangers are too great; and, interestingly, even Wigmore seems to sanction this view, a position somewhat inconsistent with his above-quoted major proposition.¹⁴⁴

Before concluding this rather rambling discussion, perhaps it would not be inappropriate to add a further word, in a general way, with respect to the dangerous uncertainties inherent in the use of the *res gestae* terminology as a method of determining whether hearsay is admissible; and these dangers are strikingly demonstrated by two comparatively recent cases: *Dorsey v. Prudential Insurance Co. of America*,¹⁴⁵ decided by the West Virginia court; and *Standard Accident Insurance Co. v. Heatfield*,¹⁴⁶ decided

¹⁴² WIGMORE, EVIDENCE § 1385.

¹⁴³ See Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1121 (1927).

¹⁴⁴ "There is, however, an apparent flaw in this argument [in favor of admissibility], which seems to nullify it. For example, in a railroad collision, we have the exciting causes known by other evidence; and under other Exceptions to the Hearsay rule—for example, regular entries, we first prove the regularity of the entries by other evidence. Now in the present case, if we accept the complaint testimonially, do we not admit it in advance as evidence of these very circumstances which should first be proved to make it admissible?"

"The solution seems to be as follows: If there is no other evidence of an assault, or where there is evidence merely of intercourse but not necessarily against the woman's consent, we are in truth committing the error of accepting her statement as itself evidence of the very facts which should first be otherwise shown in order to make the declarations spontaneous. But if there is already other evidence of a violent assault, and the statement is useful as disclosing the identity of the assailant or the further circumstances of the assault, we are not reasoning in a circle, and there is no objection to admitting the statement." WIGMORE, EVIDENCE § 1761.

¹⁴⁵ 124 W. Va. 100, 19 S.E.2d 152 (1942).

¹⁴⁶ 141 F.2d 648 (9th Cir. 1944).

by a Federal Circuit Court of Appeals. The facts in these cases were quite similar, but different results were reached.

In the West Virginia case, the issue was whether the death of the insured was caused by accidental means. There was competent evidence that the insured, an employee at a store, appeared to be in good health when he went to work one morning. But he became quite sick shortly before noon, and while he was being transported to his home in an automobile, the car had to be stopped twice to let the insured get out, and on one occasion he "gagged like he was trying to vomit." When he was delivered at his home at about 2:00 P.M., "he was deathly pale, was bent over holding his stomach," and according to the testimony of a domestic, "the first thing he said was, get the doctor, and then he said he had hurt himself from lifting boxes." A physician was called and it was found, both by diagnosis and by surgical operation performed at 4:00 P.M., that the insured had ruptured a duodenal ulcer. The court held that the declarant's statement was not admissible "as a part of the *res gestae*."

In the other case, there was an issue as to whether the insured had died of heart failure brought on by overexertion (lifting); and it was contended that statements made by the insured an hour and a half after the exertion took place were not sufficiently spontaneous to be admissible under this exception. But the court, in a well-reasoned opinion, held the evidence admissible. Said the court (*inter alia*):

"... extreme exertion and pain would be, to him who experiences them, facts sufficient to satisfy the theory of admissibility as part of the *res gestae*. The declarations were made by the only participant in the accident; he suffered severe pain from the time of the exertion until some time after he made the statements in question; it was pain which was followed by his death within twelve hours and pain which, according to the testimony, was excruciating. Such anguish negatives the existence of reflective thought. There is nothing in the evidence arousing any suspicion of deliberation on the part of the declarant, but on the contrary there is every appearance of spontaneity."¹⁴⁷

The West Virginia case seems to have relied unduly on the rationale of contemporaneity supposedly inherent in the *res gestae*

¹⁴⁷ *Id.* at 651.

terminology. The court ruled the hearsay inadmissible for the reason that "The evidence adduced by the plaintiff does not fix the time, even approximately, on September 12th, when the rupture of the duodenum occurred."¹⁴⁸ It is respectfully submitted that the pivotal question of fact in the case is not "when the rupture of the duodenum occurred;" for the startling event or condition was not the physical rupture, not the initial occurrence: it was, as indicated in the *Heatfield* case, the intense pain brought on by the injury or ailment. And that "startling" pain was, to some extent at least, a continuing occurrence or condition, so much so that it would not matter if "the rupture" had occurred several hours before the statement was made, provided of course that the extreme pain brought on by the rupture (or ailment) had been sufficiently continuous to keep the reflective faculties stilled to such an extent as to negative the likelihood of a fabricated story. The reasoning of the court in the *Heatfield* case (if applied to the *Dorsey* case) would have required a ruling on the question whether the declarant, at the time he made the statement in dispute, was still under the stress of a nervous excitement caused by the intense pain.

It should be noted that the exclusion of the evidence in the *Dorsey* case cannot be explained on the ground that the challenged hearsay declaration was not usable to prove the happening of the startling occurrence; for in that case, as in the *Heatfield* case, there was other and competent evidence as to the existence of excruciating pain.¹⁴⁹ The exclusion of the hearsay in the *Dorsey* case may have been justifiable, but it may well have been that the evidence was admissible.

In conclusion, it is submitted that there is but one effective remedy for most of the inconsistencies and uncertainties herein considered; and that remedy is nowhere more interestingly indicated than in a famous colloquy between Holmes, J., and an attorney by the name of Linscott who was trying a case before Holmes and attempting to get in some hearsay evidence. An unofficial report of the colloquy runs in part as follows: "No," said the Judge, "the hearsay rule has been a good deal nibbled round the edges, but nobody has taken quite such a bite out of it as that! And I think I won't set the example." "Not as a part of the *res gestae*?" sug-

¹⁴⁸ 124 W. Va. at 105, 19 S.E.2d at 154.

¹⁴⁹ *Id.* at 102, 103, 19 S.E.2d at 153: "he was deathly pale, was bent over holding his stomach . . . gagged like he was trying to vomit."

gested the lawyer hopefully. "The man that uses that phrase," retorted Holmes, "shows that he has lost temporarily all power of analyzing ideas! For my part I prefer to give articulate reasons for my decisions!"¹⁵⁰ In like vein, Judge Learned Hand (may his tribe increase!), in discussing the admissibility of an extrajudicial declaration which an attorney sought to have excluded on the ground that it was not a part of the *res gestae*, made this memorable remark: ". . . as for '*res gestae*', it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."¹⁵¹

If all judges, lawyers, too—for the arguments and briefs of counsel greatly influence the progress of the law—would adopt the commendable Holmes-Hand remedy, and not only interpret the so-called *res gestae* exception in terms of unreflectiveness based on spontaneity but abandon completely the dangerous *res gestae* terminology, a legal reform of the first magnitude would be achieved almost overnight. Great, however, is the tyranny of words; and great indeed is the *res gestae* tyranny which, sad to relate, was started on its tyrannous way by two notoriously ignorant men.¹⁵² There ought to be a law against *res gestae*!

¹⁵⁰ See MORGAN & MAGUIRE, CASES ON EVIDENCE 687, n. 85—excerpt from "J. B. Thayer's memorandum books."

¹⁵¹ In *United States v. Matot*, 146 F.2d 197, 198 (2d Cir. 1944).

¹⁵² The phrase "*res gesta*" [*res gestae*] is found "first in the mouths of Garrow and Lord Kenyon,—two famously ignorant men." See THAYER, LEGAL ESSAYS 207, 244n. (1908).